A JUDGE'S GUIDE TO MORE EFFECTIVE ADVOCACY

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When I left New York earlier this week, the newscasts were advising us of the impending arrival of the sixteenth snow storm of the winter season. My office told me yesterday that it was snowing yet again in the City. In August, when the New York skies were blue and the vegetation lush, I did not fully appreciate how grateful I would be tonight for the invitation to speak to you. With each passing snow day, my gratitude has increased exponentially.

I join my voice to those of the other speakers tonight who have conveyed appreciation to Cecilia Duquela, Chair of this Conference, for the wonderful job she has done. She has been a delight for me and my staff to deal with and an honorable representative of a fine law journal and its school. I also thank all of the students of the Revista Juridica de la Universidad Interamericana de Puerto Rico and the Dean and faculty of the law school for hosting this Conference. You have provided a beautiful setting with stimulating topics of discussion and enjoyable events. I have also been delighted to have met the many distinguished guests who have spoken and attended the Conference, some of whom are here tonight. Finally, I thank you the conferees and other guests for the opportunity to share my thoughts as a recently appointed federal judge about the experience of judging and what it has taught me about effective and efficient advocacy. For reasons I will shortly discuss, I have concluded this past year that effectiveness and efficiency in advocacy are synonymous terms for persuasive advocacy.

I selected my topic for tonight in October of this past year, shortly after the law journal

invited me to speak and as I celebrated my first anniversary on the bench. As many do with other important anniversaries, I reflected upon all that had occurred, all that I had learned, and all that remained for me to learn and do. During my nomination process, all of my future colleagues on the bench told me that I was about to be given the privilege of having "the best job in the world." A year and a half later, I join in their opinion.

In no other legal work I know of, in the private or public sector, is there greater variety and in-depth treatment of legal issues than in judging. From the common diversity cases involving personal injury or partnership, corporate or contract disputes, to the more complex cases involving antitrust, securities, habeas and other constitutional questions, I, as a federal judge, do not superficially investigate those areas of law, but I learn them in greater depth and at a greater speed than I ever did as an advocate or as a law student in semester long courses. The greater gift, however, is not just the intellectual stimulation of the work but the opportunity I am given to do work that is not merely an academic exercise, but which directly and profoundly effects individuals and our society.

In my first year alone, I presided over the class action settlement of claims of institutionalized mentally deficient patients for regular access to greater sunlight. I decided a First Amendment challenge to an ordinance that banned the display of fixed religious displays in a City's parks. The power of my position became a stark reality for me when I learned that the City Council and its legal staff spent days in emergency sessions considering how to approach my decision. Ultimately, they decided not to appeal my injunction and a menorah was displayed in the City's park during the Passover season. With a heavy heart, because I believe that those charged with doing justice like the police and prosecutors have a responsibility to do their work

with the highest degree of integrity, I suppressed evidence in a major narcotics case, because I found that the magistrate judge had been misled into issuing a search warrant. Just last month, I presided over a civil forfeiture trial by the United States government against the twenty-five year Clubhouse building of the Hell's Angels Motorcycle Club of New York.

I have done exciting things. However, I have also addressed intellectually less weighty or fascinating matters. In fact, a good portion of my work may fall into that category. Although every case is important to the parties and I try very hard to give all my cases the same degree of care -- albeit not the same time since that is impossible and not necessary for many issues -- there are routine and frankly boring cases. I have tried a $35,000 sprained ankle case under the Federal Employees Liability Act. I spent weeks writing an opinion on whether non-longshore-person harbor workers should be treated like longshore persons for purposes of negligence recovery under the Longshoreman's and Harbor Act. If you do not understand the issue or its importance to the defendant, you know now why I spent so much time trying to understand the case and the defense arguments. The Second Circuit affirmed my judgment, describing my opinion as straight forward and on point, while explaining that the defense simply had a tortured argument. Here, as a new judge, I thought I was missing something and I repeatedly read the voluminous and turgid submissions of the defense until I finally decided that if I was missing something in the defense argument, I was incapable of finding it. The Second Circuit did not find it either, but the practical lesson I took from the experience was not just that I should trust my legal instincts, but that unless I spent less time on incomprehensible submissions, my docket would grind to a screeching halt.

Judge Patricia Wald of the D.C. Circuit Court and Justice Anthony Scalia of the Supreme

Court have both adequately and elegantly described the frustrations and burdens of judging. If any of you are interested, Judge Wald's article is entitled "Some Real-Life Observations about Judging" and it appears in the 1992 volume 26 of the Indiana Law Review [at page 173]. Justice Scalia's remarks were delivered before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents on February 19, 1988, and a discussion of Justice Scalia's remarks can be found in an article written by Professor Judith Resnik contained in the 1988 volume 6 of the Southern California Law Review [at page 1877].

Perhaps because I am so new to the work, however, I have not been disillusioned or frustrated as of yet, and I hope that for the rest of my judicial career, my work remains the "best job in the world." Among my comments to my law clerks and friends as I reflected about my first year, I expressed the regret that I had not judged before I lawyered. When I practiced, if I had known a fraction of what I have learned in my first year as a judge, I would have been that much better a lawyer. [As an aside, my actual statement was that I would have been invincible as a lawyer. I had to tone it down for the sake of some decorum and humility.] In some civil law countries, there are different schools for careers as a judge or a lawyer. In our legal system, however, without the experience one gathers as a lawyer, it is impossible to function as a judge and fully understand the nuances of legal analysis.

As new lawyers, clerking for a judge is probably the next best step to being a judge. Because many of you are editors on law journals, you will likely have this experience. But for those of you who do not and even those of you who do, I bring to your attention the following observations I now, having had the experience of judging, make about effective and, as I have said previously, efficient advocacy. My observations and recommendations are not new and they

are very simple. All were told to me, or I read, in bits and pieces through law school and in my practice. Because most of you are graduating this year, and are just about to begin your careers, I thought it might be helpful to underscore that advice, which I now as a judge have grown to appreciate more.

Judge Wald of the D.C. Circuit in her article, [page 178], on Real-Life Judging, states, and I paraphrase in part:

> "The elegant prose, the visionary idea, the qualitative leap forward in the law [by judges has now been] cancelled by . . . practical necessit[ies] . . . ."

Judge Wald was speaking about the practical necessity of reaching consensus among circuit court panels, a difficulty described to you on Thursday by Judge Naveiro de Rodon in her panel discussion. Practical necessities, as recognized by Judge Wald in a different part of her article, however, effect all levels of the judiciary. Although district judges decide cases alone and do not have to work toward consensus, they still have the burdens of an ever burgeoning word-load. Less than 80% of the decisions of district judges are ever appealed. Of the over 100,000 opinions rendered by lower courts in a given year, the Supreme Court, with nine judges, hears slightly over 125 cases a year. When my dear friend and mentor, Judge Jose A. Cabranes of the United District Court for Connecticut, was asked how he felt when he was reversed by the Circuit court, he responded "It does not bother me in the least, I reverse them every day." He is right. Given the almost unreviewable nature of the majority of our decisions, you, as proxies for the interests of your clients, should appreciate how important it is to ensure you capture your judge's attention. This need on your part will grow as Congress increases our burdens by continuing to federalize more crimes and passing more statutes granting remedies to an ever wider number of groups, as with the Americans with Disabilities Act. In short, we can not afford

to have our dockets grind to a halt because of ineffective or inefficient advocacy.

When I started as a judge in October 1992, I had 376 civil cases reassigned to me. That number represented the average case load in my district. Unlike other districts, I did not have criminal cases reassigned to me, but only began to have new criminal indictments assigned in rotation each week. Nevertheless, in my district, the average case load of criminal cases is about one-third the civil docket, or about 125 criminal cases. In my first year, I rendered about 70 written opinions, of varying lengths and complexity, and a number of other opinions I read into the record. I did reduce my caseload by fifty cases by the end of that first year. However, at the end of my year, three of my colleagues left the district bench -- Judge Pierre Leval to the Second Circuit, Louis Freeh to the F.B.I. and Ken Conboy back to private practice -- and with their departures, my case load in the last five months mushroomed to 428 cases despite the fact that I had rendered just over 50 opinions in that same time period and even more opinions on the record than I had the prior year. Moreover, I now have over 85 pending motions and over fifty criminal cases on my docket.

My burden is not unique. Judge Anne C. Conway of the United States Middle District of Florida, who took the bench at about the same time I did, had just that past winter of 1993 reported in the American Bar Association Journal on Litigation, Volume 9, that she had 570 civil cases with 1070 motions reassigned to her when she took the bench. She reduced her caseload by 100 cases and her motions to just a little over 500 by the end of her first year. Yet, she reported that despite greater efficiency, she found her motion calendar increasing. Now, her accomplishments have been reached by a herculean effort -- she starts her day at 7:00am and goes through the late evening. I admire her. I am a New Yorker and 7:00 am is a civilized hour

to finish the day, not to start it. I can not achieve efficiency her way. If the federal bench is over burdened, however, take note that most state courts are in critical emergency situations. New York's lower state court judges have over 1800 cases a piece.

No judge should bear his or her work-load as a badge of honor. One human being, no matter how efficient, cannot adequately do justice to all of the cases on dockets this big. Consider the situation in practical terms. There are 365 days in a year. Assuming you have a judge like me who works six days a week and takes some vacations (well, you do see me here), you are left with about 250-275 working days a year. With a case load of over 500 cases, no one case should physically, without regard to desire or dedication -- take more than half a day on a case. Yet, most trials consume at least two days, and many complicated criminal cases at least two weeks. I do not even mention the month and longer trials that are common, at least in my district. The Hell's Angels trial and another international narcotics trial each took the last two months before me. Many cases settle without the intervention of a judge. But, many cases are addressed more cursorily and summarily than anyone would want them to be and many cases are not heard at all. In the end, no one is happy -- not the judges who take pride in their work, but are forced to be less attentive than they would like; not the lawyers who labored hard in presenting their arguments and are then treated summarily or delayed for months or sometimes years in receiving a decision; and not the parties who want and deserve a fair day in court but do not see it. Unfortunately, in a system this overworked, the claims of some people will not be fairly heard and we cannot pretend otherwise.

In assuming my responsibilities, I have immersed myself in books and articles about efficient judging. Each day I learn more and my mistakes teach me more. Since I anticipate that

judging is a continuous learning process, I do not see my improvements ever ending. The rest of my speech now, however, is intended to give you as lawyers some ideas about how to ensure that you, as the agent for your client's interests, get heard in the mounds of papers and cases that exists in the judicial landscape.

My first piece of advice for effective advocacy is to write clearly. As it is often said, clear writing reflects clear thinking. Whether it is an unfair conclusion or not, I start with the presumption that a poorly written brief is a product of, if not poor, at least, untrustworthy lawyering, because a poor writer is someone who does not care about the art and skill of their profession. As it is also often said -- and I will hereafter stop with the cliches -- there are no natural writers, just writers who work at developing their skills.

If you have read Strunk and White, Elements of Style, reread it every two years. If you have never read it, do so now. This book is only 77 pages and it manages, succinctly, precisely and elegantly to convey the essence of good writing.

Go back and read a couple of basic grammar books. Most people never go back to basic principles of grammar after their first six years in elementary school. Each time I see a split infinitive, an inconsistent tense structure or the unnecessary use of the passive voice, I blister. These are basic errors that with self-editing, more often than not, are avoidable. To be an advocate, you must love to argue. To argue effectively, you must communicate effectively. There are stronger writers than others. I consider myself merely an average writer. Nevertheless, every advocate should at least strive to be technically correct in their writing.

Because we are in Puerto Rico, it is important that I underscore that we who are bilingual often have to spend more time and energy in improving our writing. There are natural linguistics

explanations for many common errors made by bilingual people. For example, adjectives in Spanish are expressed differently than in English. Descriptive nouns are structured in Spanish with the use of "of". Thus, in Spanish, we do not say "cotton shirt", we say "shirt of cotton" or "camisa de algodon" y no "algodon camisa." Well, as a result of this structure, many Spanish speaking American students often, unconsciously, use convoluted phrasing for simple adjectives. This was brought to my attention in college by a history professor, who later became my thesis advisor and a mentor, and who in my first college semester kindly pointed out to me that "authority of dictatorship" could more simply and accurately be stated as "dictatorial authority."

To catch many simple and complex mistakes in writing requires that you edit yourself. I am taken aback by how many briefs I receive that appear to be first drafts. I have chastised attorneys in my opinions for slip-shod written presentations. Improvements in writing do not happen magically, you have to work on them. In my chambers, I edit every opinion prepared by my clerks. The simplest opinions go through at least 2 if not 3 drafts by me. I edit more complex opinions as often as 6 to 8 times and periodically more often. Justice Kennard of the California Supreme Court, a very well respected writer, has told me that she and her five clerks, sitting together, edit every line of every opinion. I have no idea how she manages to find the time to do this but her approach should give you a clear idea of the importance of editing.

My second piece of advice is a collorary to the first -- keep your written submissions brief. No play on words is intended. The reason for this advice is self-evident in the context of the statistics I have given you. Overburdening a judge with every conceivable argument you have found or can conceive is counter-productive. Although most clerks to judges are thorough, every argument in a voluminous brief can not be given equal attention. I say clerks because

although I read every brief, I simply do not have time to reread every brief numerous times. I read my clerk's bench memo or draft opinion, I read the briefs and I stop to reread carefully only that brief which is clearly and persuasively written. The best briefs succinctly state their arguments, but also concisely summarize, explain and discount their opponent's arguments. That is the brief I turn to when I am editing the work of my clerks, because against that brief I measure whether my clerks have addressed every pertinent argument.

As editors of law journals, you pick up one terrible habit -- string cites. Think of them as nooses you should strive always to loosen from your neck of writing. The habit of thorough and exhaustive research you have learned is absolutely essential to effective advocacy. If a proposition is truly black letter law, however, one cite is enough. Judges, within a few years on the bench, know the history of most major areas of the law. New judges and clerks may not but they do not need for you to educate them in your briefs. Just give them the cites of the one or two cases that best present a history or explanation of the law in the area at issue. Do not give us your learning process on paper, just give us the results of the best arguments you have found. Take judges to the issue you are addressing and explain why it is an issue at all, i.e. is the law unsettled or unclear, are the facts unclear, is this a new twist to an old problem, do you want the judge to reject existing law and reformulate it, hopefully in your client's favor.

I want to underscore, brevity is not a substitute for thoroughness. Good lawyering requires you to consider and research every conceivable argument for and against the position you are advocating. Inexperienced lawyers particularly spend hours if not days or weeks exploring multiple and innumerable legal dead-ends. Effective lawyering, however, requires you to distill your research and thinking down to its important, best and strongest points. It is heart-

breaking after laborious and exhaustive research to realize that what you need to say can be said in five pages. As a result, young lawyers often write lengthy memos or briefs which essentially recount the steps of their research. You are doing yourselves a disservice, because you will not capture the attention of the person you must convince if you have lost them in the irrelevant. If you feel compelled by emotional necessity to advise the court or your partners of what you have done, do it in a short footnote.

In short and above all, you must be prepared for every contingency with complete research, but your only chance of attracting the attention of harried judges is to state the important issues of your case up front and succinctly. An efficient presentation means cutting the extraneous, summarizing the important but tangential, and concentrating on the significant.

Equally as important to effective advocacy is not misleading the Court about the law or the facts of your case. Do not cite cases merely to have a cite or take words out of a case to give an impression of a holding when the words when used were in a different context. Before you leave law school, learn the difference between dicta and a holding. Learn what is controlling precedent for the court system you are in. It amazes me how many lawyers cite other district court cases as controlling authority. The only binding precedent upon a district judge is the Supreme Court or its circuit court. Not even the law as established by other circuits controls decisions of a district judge in another circuit. Similarly, in the New York state system, each lower court is only bound to the decisions of the highest court or of its own intermediate Appellate Division. Further, do not cite a legal principle, without explaining its exceptions, in a footnote, at least if the exceptions are not applicable to your case. Clerks spend countless hours tracking down exceptions they later determine are not relevant to the case, as you obviously did

because you did not mention them in your brief. You should increase your malpractice insurance if you simply missed the exception. Obviously, if there is a case contrary to your position, even if it is a decision by a non-controlling source, cite it to the court. Your entire argument should have explained to the Court why that contrary opinion is not persuasive. If there is an argument that superficially appears applicable or an argument in a related field, bring it to the judge's attention in a footnote and explain why you do not think it is relevant to or distinguishable from your case. The worst thing a judge can ever conclude about you as a lawyer is that you are untrustworthy in your arguments. I was furious the other day when an attorney failed to tell me that the circuit had explicitly left an area of the law undecided and that three other of my colleagues had issued opinions on the issue contrary to counsel's argument. I know that for those lawyers who do this I rarely, if ever, give them the benefit of the doubt. I will reserve decision to go back and doublecheck their arguments. If you are in the middle of a trial, that can be a devastating interruption in your presentation as an advocate and will result in long delays in your motions being decided.

There are some lawyers out there who believe that overwhelming a court with papers and documents is a good way of hiding a bad case and delaying judgment against a client. I find this particularly true in papers opposing summary judgment motions. This tactic may work periodically, but the price you pay for this type of bad lawyering is that your work and arguments eventually will not be respected. In summary, face the weakness in your case directly and answer up front why the court should ignore or distinguish the weakness from existing law or on the facts.

For my third point, I turn to oral advocacy. My intent here is not to repeat the advice

contained in trial advocacy courses on proper and effective opening and closing statements, direct and cross-examinations or motion or appellate arguments. There is a legion of materials on these topics and in a short speech, I could not do justice to the wealth of advice that exists. I simply wish to underscore that brevity and clarity is as important in oral as in written presentations.

Neither jurors as triers of facts nor judges like being inundated with documentary evidence. Most cases can be distilled down to less than half a dozen documents, sometimes just 1 or 2. Yet I receive boxes and boxes of exhibits in too many cases. That impresses your client -- until they get your bill for the time and cost of collating and copying. In the interim, you have lost the favorable impression and potence of your valuable documents. To the extent possible, try to get stipulations of facts among counsel and cut out of your presentations all documents relating to those agreed upon facts. Also, prepare a small volume of just the critical documents so the Judge can refer to them easily or take them home without losing an arm to heavy weight. Jurors who sit side by side like sardines in jury boxes appreciate not having to fumble with heavy volumes on their laps and at their feet. Finally, all exhibits should have an index. Moreover, a topic index, listing relevant exhibits under issue headings, is also very helpful. When I write my opinions I often have one or more issues about which I would like to more fully look at the evidence. A topic index is invaluable in assisting that process, because even the best organized chronological or theme organized exhibits support or inform various different issues.

Similarly, when you give a judge deposition transcripts, it is useful to give a one page summary of what that witness proves in the deposition testimony and why it is important to your case. That way, the judge will understand why they are reading the materials. Judge Leonard

Sand in an 1987 article in the ABA Journal on Litigation, also suggests that parties take one deposition transcript and bracket in different color crayons the designations each party wants in the record. This way the judge gets one transcript, and not separate sheets with each party designating a page and line in the transcript. That kind of cross-referencing to a transcript is time-consuming and frustrating.

Finally, in oral presentations, remember that although some repetition is necessary to ensure that a point is made, less repetition is needed with a judge. Moreover, you lose both the attention and patience of judges and jurors with overly long presentations. If a long presentation is unavoidable, i.e. the witness simply has too much to cover, make sure your beginning explains what you are doing, and why, and that your end explains again what you have done.

In conclusion, respect the limited time judges have. With thought, the most complex case can not only be explained simply, but can be presented simply. Today, effective advocacy requires that you think first and foremost -- how do I make this easy to understand and to absorb in the shortest time possible. Because of necessity, an efficient presentation has become the effective presentation and not infrequently, the winning presentation.

I will heed my own advice and keep my remarks brief. I hope that you take from your careers as much as I had from my own as a lawyer. I also hope and expect that some of you in the future will have the opportunity to enjoy the privilege and honor of judging. A critical part of that enjoyment in either or both roles starts and ends with doing what you do better each day. It means appreciating the art of your profession and spending time developing your skills. Seeing an effective advocate in court is a magnificent and pleasurable experience for a judge. I also hope that during what I expect will be my long tenure on the bench, I will have the opportunity to

have some of you appear before me and that at the end of your presentation, I will be able to say that you have mastered your art. My wishes for successful careers to all of you. Good evening.